

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

To be argued by
Jerome F. O'Neill

Docket No.

77-1217

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
p/s

UNITED STATES OF AMERICA

Appellee

v.

DANIEL BICHARA ZOGBI

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v

DANIEL BICHARA ZOGBI

Appellant

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

Daniel Bichara Zogbi appeals from a judgment and conviction entered on April 11, 1977 after a three-day trial before the Honorable Albert W. Coffrin, United States District Judge, and a jury.

An indictment bearing criminal number 76-60 and filed on August 19, 1976* charged Daniel Bichara Zogbi in a single count with exporting from the United States

* Defendant's Appendix (DA) 5. Other abbreviations are DAd - Defendant's Addendum, DB - Defendant's Brief, GX - Government Exhibit, GA - Government Appendix, Tr. - Transcript.

to Canada arms and implements of war designated by the United States Munition List without having filed a shipper's export declaration, in violation of 22 U.S.C. § 1934.* The trial of the defendant commenced on February 1, 1977 and the jury returned a verdict of guilty on February 3, 1977.

On April 11, 1977 Judge Coffrin sentenced Zogbi to one year in the custody of the Attorney General, the execution of the sentence was suspended with the exception of sixty days and Zogbi was placed on probation for a period of three years to commence upon his release from confinement. The sentence is to run concurrently with an identical sentence imposed in D. Vt. Cr. No. 76-79.** Zogbi's bail was continued pending appeal.

* Although the indictment made reference to 22 U.S.C. § 1934, this statute was repealed by Public Law 94-329 as of June 30, 1976 and replaced by 22 U.S.C. § 2778. This was brought to the attention of counsel prior to the trial and the court charged the jury that the applicable statute was 22 U.S.C. § 2778. (Tr. 167-68, 332)

** Zogbi was convicted after a jury trial in April, 1977 in D. Vt. Cr. No. 76-79 of removing merchandise, to wit, a 1976 Pontiac, from the custody and control of the United States Customs Service on Sept. 23, 1976 and also of transportation in foreign commerce of that automobile, knowing it to have been stolen. That case is on appeal to this court in docket no. 77-1218. Zogbi also was convicted in the U.S.D.C. for the Northern District of N.Y. on February 24, 1977 of importing a firearm, a Thompson semi-automatic carbine, into the U. S. on July 25, 1977 in violation of 18 U.S.C. §§ 922(1) and 924(a). He was sentenced by Judge MacMahon to 60 days concurrent to the Vt. sentences. That case is on appeal to this Court.

STATEMENT OF ISSUES

- I. WHETHER THE PROBATIVE VALUE OF SOME OF THE GOVERNMENT'S EVIDENCE AND CROSS-EXAMINATION OF THE DEFENDANT WAS OUTWEIGHED BY ITS POSSIBLE PREJUDICE TO THE DEFENDANT.
- II. WHETHER THE SUMMATION OF THE UNITED STATES WAS PREJUDICIAL TO THE DEFENDANT.
- III. WHETHER THE READING OF TESTIMONY TO THE JURY DURING ITS DELIBERATIONS WITHOUT OBJECTION WAS PREJUDICIAL TO THE DEFENDANT.
- IV. WHETHER AFTER THE JURY INDICATED THAT IT WAS DEAD-LOCKED THE COURT PROPERLY GAVE THE JURY A MODIFIED ALLEN CHARGE.
- V. WHETHER THE GOVERNMENT FAILED TO PROVIDE THE DEFEND- AND WITH ORAL STATEMENTS TO WHICH HE WAS ENTITLED UNDER RULE 16.
- VI. WHETHER THE GOVERNMENT PRODUCED SUFFICIENT EVIDENCE TO SHOW THAT THE MUNITIONS WERE EXPORTED AND THAT ZOGBI ACTED KNOWINGLY AND WILLFULLY.

STATEMENT OF FACTS

On July 25, 1976 defendant Daniel Zogbi and an individual by the name of Byron Kennedy entered the United States from Canada at the Port of Entry of Champlain, New York. (Tr. 19, 23, 185)*

Zogbi had in his possession and declared to U. S. officials a .45 caliber Model 1927A1 Thompson semi-automatic carbine, serial number 1729, and a Fabrique National (hereinafter "FN") assault rifle. (Tr. 20, 72-74, GX 3) Zogbi indicated to U. S. officials that he was going to a gun show in Schenectady, New York, was going to look for some weapon parts in the U. S. and was bringing the Thompson to Numrich Arms in West Hurley, N. Y. to be examined. (Tr. 21, 30, 72-73) After being questioned initially by Customs inspectors, Zogbi was questioned by Special Agents Larry J. Davis of U. S. Customs and Paul DuCuennois of the Bureau of Alcohol, Tobacco and Firearms. (Tr. 25-30, 72-85) Special Agent DuCuennois advised Zogbi of the requirements of the Gun

* Zogbi's testimony at his trial was transcribed prior to the remainder of the transcript. The court reporter omitted pages 173-266 in his preparation of the remainder of the trial transcript with a notation that Zogbi's testimony should be inserted there. References in this brief to pages 173 through 266 therefore are to the transcript of Zogbi's testimony which has been repaginated to reflect the numbers assigned in the complete trial transcript.

Control Act of 1968 with respect to the importation of firearms into the United States as well as the necessity for prior authorization. (Tr. 25-26, 74-83)

Special Agent DuCuennois indicated to Zogbi that it was important that Zogbi understand the importation requirements, offered Zogbi his telephone number, indicated that if Zogbi had any questions he should contact his office and told Zogbi that the conversation with him would be made a matter of official record. (Tr. 87) Zogbi disagreed with Agent DuCuennois about the importation of the FN, and stated that FNs with certain serial numbers could be imported. (Tr. 82) Zogbi also told Agent DuCuennois that he understood what Agent DuCuennois was telling him and that he previously had made inquiry of the ATF office in New York City. (Tr. 86-87)

The agents also ascertained from Zogbi that he was in the firearms business in Canada and had previously exported ammunition from the United States without filing a shipper's export declaration. (Tr. 26-27, 30, 83-84) Special Agent Davis explained to Zogbi the circumstances under which a shipper's export declaration had to be filed * (Tr. 26-28, 84), as did Special Agent DuCuennois, but in a more general way. (Tr. 84)

* Zogbi denied in his testimony that the agents ever mentioned the shipper's export declaration to him. (Tr. 244-45, 253).

Zogbi was thereafter turned back to Canada with the two weapons since he did not have the required ATF forms to import the weapons. (Tr. 31, 85) He returned a few minutes later, and although he had previously been told the U. S. Customs would not hold firearms for him while he went to the gun show, he again tried to leave the firearms on the U. S. side, which he was not allowed to do.* (Tr. 30, 32, 86)

Zogbi had done business with Numrich Arms Co. since January, 1976 and had done business with them on two or three occasions in a total dollar volume of \$5,000 to \$7,000. (Tr. 46) Zogbi had purchased some of their new Thompson semi-automatic carbines as well as parts for military weapons and had been interested in distributing the Thompson for Numrich in Canada. (Tr. 46-48) On July 27, 1976 Zogbi appeared at Numrich Arms with a Thompson receiver with the serial number 1729 which he had purchased from Numrich and which was damaged. (Tr. 48-

* The agents described Zogbi as not being pleased that they would not do as he was asking (Tr. 32); arrogant and pushy in his attitude, obsessed with getting to the gun show (Tr. 42-43); argumentative (Tr. 82); extremely excited at one point. (Tr. 86)

49, GX 3) Numrich exchanged the receiver for another one and Numrich stamped the same serial number on it as the one Zogbi had brought in, number 1729. (Tr. 49, GX 3) Zogbi also purchased at that time other firearms parts with a total value of \$1,396.81. (Tr. 49-51, 254-56, GX 43, 47, 86, 74, 75, 76)

Just prior to midnight on July 28, 1976 Canadian Customs Officer Michael Desseault was on duty at the Port of Entry into Canada at Phillipsburg, Quebec, Canada. (Tr. 103-04) Zogbi appeared and indicated he had some firearms parts. (Tr. 104) He was given the choice of either leaving the parts in the Customs warehouse to be examined by the RCMP in the morning or returning to the United States at that time. (Tr. 105) Zogbi subsequently approached Canadian Supervisor Customs Officer John Dunnigan after Dunnigan came on duty at midnight and again was told that he could either leave the material in the warehouse to be examined in the morning, or he could go back to the United States. (Tr. 111). When Zogbi indicated that he did not wish to leave the parts in the warehouse overnight because he was concerned that some parts would be missing, he was told by the Customs officer that, since Zogbi did not trust the Canadian Customs, he must go back to the United States with the parts.* (Tr. 111)

* The version of the facts contained in defendant's brief which indicates that Zogbi returned to the U. S. voluntarily is based on Zogbi's testimony. (DB 4, 7, 19) (See Tr. 197) It is hardly a version of the facts in the light most favorable to the Government as is required. United States v. Glasser, 315 U.S. 60 (1942).

Zogbi then returned to the U. S. Port of Entry at Highgate Springs, Vermont with Byron Kennedy and indicated to U. S. Customs Inspector James M. Demetrules that he had "merchandise" in the car which he was not being allowed to take into Canada and that he would have to go through a Canadian Customs broker in the morning. (Tr. 133) An examination showed that the merchandise consisted of the gun parts purchased at Numrich, as well as the new Thompson receiver he had obtained, most of which was on the Munitions Control List. (Tr. 52-61, 134-38) Zogbi had not filed a shipper's export declaration for these items prior to leaving the United States. (Tr. 135, 155, 163)

Zogbi was questioned by Special Agents of the U. S. Customs Service to whom he indicated that he had taken the receiver (barrel action) (GX 3) to Numrich Arms for exchange on July 25. (Tr. 143, 144, 151) He indicated that he had gone through the Port of Champlain, New York and had not declared the barrel action because he did not want a hassle from U. S. Customs. (Tr. 152-55) The parts and the barrel action were then seized by U. S. Customs. (Tr. 156)

ARGUMENT

I.

THE PROBATIVE VALUE OF ALL OF THE GOVERNMENT'S EVIDENCE AND ANSWERS ELICITED ON CROSS EXAMINATION OUTWEIGHED ANY POSSIBLE PREJUDICE TO THE DEFENDANT.

A. The Smuggling Into the United States of the Thompson Receiver

Defendant contends that numerous pieces of evidence should not have been admitted since the probative value was outweighed by the prejudice to the defendant. Defendant's first contention is that the Court should not have admitted evidence that Zogbi smuggled the Thompson receiver into the United States after he was told he would need an ATF permit and sent back to Canada.*

Defendant concedes, however, as he must, that prior criminal acts are admissible under some circumstances. Specifically Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs or acts

* Defendant phrases this contention more boardly in terms of the illegal importation of "guns" (DB 5) but there is no indication anywhere in the record that the Government introduced or sought to introduce evidence of the illegal importation into the United States of any weapons other than the Thompson receiver. This was the weapon which was exchanged at Numrich Arms as damaged and exported from the United States on July 22, 1976 without the filing of a shipper's export declaration.

may be admissible to prove, among other things, motive, intent, knowledge, and absence of mistake or accident. The Government did introduce evidence of the smuggling into the United States of the Thompson receiver to show Zogbi's motive not to file a shipper's export declaration when he left the U. S. on July 27th (a cross check against importation permits and investigation at Numrich would show that he had smuggled in the damaged Thompson receiver). (Tr. 115-19) The District Court carefully weighed the probative value of this evidence against any possible prejudice to the defendant and found it relevant to establish "knowledge, intent, state of mind, and factors of a like nature." (Tr. 119-22, 125) The District Court's exercise of discretion was clearly in line with Rule 404(b) of the Federal Rules of Evidence and precedent in this Circuit and the prejudice to the defendant certainly did not overwhelm its probative value. United States v. Magnano, 543 F.2d 431, 435 (2d Cir. 1976); United States v. Santiago, 528 F.2d 1130, 1134 (2d Cir.), cert. denied, 96 S. Ct. 2169 (1976). Judge Coffrin's balancing of probativeness versus prejudice is one in which he has wide discretion and which will rarely be disturbed on appeal unless he acts arbitrarily or unreasonably. United States v. Robinson, No. 76-1153 (2d Cir. July 28, 1977) at 5032-34. See, e.g., United States v. Dwyer, 539 F.2d 924, 927-28

(2d Cir. 1976); United States v. Leonard, 524 F.2d 1076, 1092 (2d Cir. 1975); United States v. Ravich, 421 F.2d 1196, 1204-05 (2d Cir. 1970). Further, the only claim of prejudice made by the defendant at the District Court level was that the admission of such testimony would make it difficult for the defendant to take the stand since he would be cross-examined concerning this and the case pending in the Northern District of New York might be affected. (Tr. 120) The Court subsequently prohibited the Government from asking Zogbi about this on cross-examination, thus eliminating the only specific claim of prejudice made by the defendant about this evidence at the District Court level. (Tr. 125-27, 203-05)

B. The Reference to the "Gangster Gun."

Defendant claims he was prejudiced by one of the agent's references to the Thompson as a "gangster

* Defendant also contends that the limiting instruction given with respect to this evidence was insufficient. While the Government agrees that the instruction could have been more detailed, defendant did not request a limiting instruction, propose specific corrective language to the Court or object to the instruction as given. Hence, he is prohibited from the raising of the issue at this time absent plain error, which certainly has not been shown. F.R.Cr.P. 52. United States v. Indiviglio, 352 F.2d 1196, 1204-05 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 971 (1966)

gun.* (DB 9) This claim is rapidly undercut by the lack of an objection, United States v. Indiviglio, supra, but also because defendant takes the reference completely out of context. The agent testified as follows:

Q. Special Agent Davis, could you describe for us, essentially, what the Thompson looked like?

A. It is what used to be a gangster gun or old World War II type; World War I-II type weapon, depending on the parts being used. It is a semi-automatic in one form and automatic in another form. It may have a pistol grip in the front, a drum magazine or a straight feed magazine.

(Tr 23-24) (emphasis added) Other evidence in the case showed the particular weapon (GX 3) was a replica of the Thompson sub-machine gun and was a semi-automatic.

(Tr. 48-49, 73, GX 3, 73 at p. 47)

C. Testimony Elicited on Cross Examination that Zogbi Had Been Involved in Prior Fraudulent Invoicing.

Defendant mentions this claim only in passing
(DB 9) and this is not surprising since it went clearly

* Defendant states that the U. S. agents referred to the Thompson as a "gangster gun", "even though it is recognized that the defendant is a legitimate firearms dealer." (DB 9) Nothing in the record other than some of Zogbi's testimony supports the claim that Zogbi was a legitimate gun dealer, and although the Government did not argue the contrary, at no point did it concede that Zogbi was a legitimate gun dealer.

to Zogbi's credibility as well as his claims of ignorance about Customs procedures in general. (Tr. 213-21, GX 82-83) Further, this evidence was not brought out by the Government in its direct case but came out during its cross-examination of Zogbi. (Tr. 215-19)

D. Testimony Elicited on Cross Examination
that Zogbi had Perpetrated a Hoax on
Government Agents and had Threatened
Their Jobs for Arresting Him

In another very brief reference defendant suggests that the cross-examination of Zogbi with respect to the hoax he perpetrated on Government agents after his arrest was prejudicial to him. The Government very carefully limited its questioning to the fact that there was a hoax and that Zogbi had admitted he lied to them in an attempt to get the charges dropped and have his munitions and car returned. (Tr. 260-66, GA 1-7) At no time did the Government bring out before the jury that this hoax involved an alleged assassination of a Government agent. (Tr. 126-31) The relevance of this to Zogbi's credibility is obvious, as noted by Judge Coffrin. (Tr. 129, 278-79) Lastly, defendant's counsel did not object to this testimony until after Zogbi's testimony was complete and the Government had put on three rebuttal witnesses, none of whom talked about the hoax. Even then the statement made by

Mr. Tyler was not an objection as such. (Tr. 278-79)
No request was made that the jury be instructed to disregard this testimony. Id.

The evidence that Zogbi threatened the agents' jobs clearly went to his credibility, but further it was not objected to. (Tr. 256-57, 269, 274) United States v. Indiviglio, supra.

E. The P.L.O. Connection

Defendant in only two lines in his brief states that the Government tried to imply that a Government agent believed Zogbi was a member of the P.L.O. (DB 9) However, the reference in the case to the P.L.O. first came out in the Government's direct case when in a question on cross-examination by defendant's counsel an attempt was made to suggest that the agent believed Zogbi was a possible terrorist and was in the Treasury computer system. (Tr. 88-89) The first mention of the P.L.O. in response to questioning by the Government resulted when Zogbi himself went beyond the scope of a question on cross-examination and mentioned the P.L.O. (Tr. 242). The Government at no time tried to suggest to the jury that it believed that Zogbi was a member of the P.L.O. (Tr. 276) Rather, Zogbi was attempting to suggest that the Government believed he was a member of the P.L.O. (or a terrorist) and was out to get him for this reason. (Tr. 305-06)*

* Defendant brought out himself that the Olympics were going on in Montreal at the time of these events. (Tr. 187)

II.

THE GOVERNMENT'S SUMMATION WAS ENTIRELY PROPER

Defendant contends that the Government's argument was prejudicial and is a basis for reversal of his conviction. Once again, with a shotgun approach, he refers to such things as the argument by the Government that Zogbi had a motive for not filing a shipper's export declaration because if he had done so he would very possibly have been caught for illegally importing the receiver in the first place. Inasmuch as the underlying evidence was properly admitted, the Government very properly could argue the defendant's motive at the time he exported the receiver from the United States. References to the falsified invoices were properly admitted into evidence as noted earlier to show Zogbi's knowledge of Custom's requirements and procedures as well as his intent here and accordingly could also be properly argued.

Defendant also contends that the Government argued that it could have introduced evidence of Zogbi's connection with the P.L.O. if it had wanted to get a conviction. The record belies such an interpretation, however, since what the Government specifically stated when the language of the argument is carefully read was that it did not contend that Zogbi was associated in any respect with the P.L.O.

Further, any references to the P.L.O. in argument had initially been brought out by defendant's counsel in his own argument and was simply being rebutted by the Government. (Tr. 306, 321, GA 8, 9)

Although defendant makes a number of generalizations about the Government's summation, most points were not objected to and defendant fails to support other claims with specific items of Government misconduct. See DB 12.

III.

THE READING OF TESTIMONY TO THE JURY DURING
ITS DELIBERATIONS, WITHOUT OBJECTION, WAS
NOT PREJUDICIAL TO THE DEFENDANT

At one point during its deliberations* the jury indicated in a note to the court that it needed clarification of the conversation of July 25th pertaining to the form required to be filed to export arms from the United States. (Tr. 338) The Court recognized that the only testimony on this subject was that of two of the agents and Zogbi's own testimony. Id. As the court stated after receiving a second note from the jury, the delay in getting the information to the jury had been a result of going through the notes and finding the part concerning the discussions on the 25th relative to the export of arms from the United States. (Tr. 339) Testimony was thereafter read to the jury as had been requested and the absence of any objection in the record

* Defendant suggests that the jury had been deliberating for five hours and two minutes at that time (DB 13), however, this figure is arrived at by noting the time the jury retired, 10:53 AM and the time when the subject was next brought up in chambers, 2:25 PM. (Tr. 337) This calculation omits the fact that this jury was entitled to the same time-honored Vermont tradition as are other Vermont federal juries, lunch on the Government. This does not appear as a matter of record at any point, nor does the exact length of time the jury was at lunch.

believes the claim by defendant now that the testimony was one-sided.* (Tr. 341) Therefore, even to the extent that the testimony was in one respect one-sided, which the Government strongly believes it was not, the failure to object prevented the District Court from having any additional testimony read which could have corrected any possible error.

* The record as presently available does not indicate how it was agreed which testimony was to be read nor how the Court arrived at its statement of Zogbi's position. Defendant claims in footnote 9 of his brief that much of the discussion of what was to be read back was not transcribed. This would appear to mean, although incorrectly phrased, that it was off the record. In any event, Mr. Tyler apparently did not object to the procedure nor ask to put anything further on the record and can hardly be heard to complain now. United States v. Indiviglio, supra.

IV.

AFTER THE JURY INDICATED THAT IT WAS DEAD-
LOCKED THE COURT PROPERLY GAVE THE JURY A
MODIFIED ALLEN CHARGE

With no case support on point, defendant contends that an Allen type charge should not have been given here. The numerous Second Circuit cases on this subject illustrate the correctness of the District Court's actions. E.g., United States v. Robinson, No. 76-1153 (2d Cir. July 28, 1977) (en banc); United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); United States v. Green, 523 F.2d 229, 236 (2d Cir. 1975).

V.

THE GOVERNMENT PROVIDED THE DEFENDANT WITH
ALL ORAL STATEMENTS TO WHICH HE WAS ENTITLED
UNDER RULE 16.

The defendant makes a somewhat confusing claim that he was prejudiced by the failure of the Government to provide certain oral statements made by the defendant to Government Agents. A motion for discovery originally filed by Zogbi sought, in essentially Rule 16 language, permission to inspect, copy, photograph or otherwise discover the substance of any oral statement or statements by the defendant in response to interrogation by a person known to him to be a Government agent at the time of the questioning and which were in any way relevant to the case. Assistant U. S. Attorney John R. Hughes, Jr. on October 12, 1976 wrote to counsel for Mr. Zogbi and provided him with the essence of the statements.* No claim was made at any time by defendant that this information was inadequate nor that he had

* A copy of that letter is reproduced at GA 10-12. This letter is no more a part of the record than is the letter from Assistant U. S. Attorney O'Neill reproduced in Defendant's Addendum at 11-12. Defendant's counsel received the October 12th letter. (Tr. 167-68)

been prohibited from inspecting or copying statements in the original reports. However, when the case was assigned to another Assistant U. S. Attorney for trial, a letter was forwarded to defendant's counsel on January 27, 1977 to update a number of matters, to specifically clarify any possible confusion and to insure that counsel for the defendant understood that there might be other oral statements which would be introduced but which were not reproduced in a report. (DA 11-12) Defendant's brief seems to suggest that he did not receive all Rule 16 statements, but no claim of this was ever made in the trial court and any such claim is belied by the letter forwarded on October 12, 1976 to his counsel.*

There also is some suggestion in defendant's brief that he was entitled to something beyond statements included in Government reports:

The Notes on Advisory Committee on Rules, 18 U.S.C.A., F.R.Cr.P. Rule 16, at 336 indicate further that the new amendment provides for

* One problem which defendant's brief appears to suffer from is a lack of familiarity with the record since there are numerous references outside the record and a number of factual inaccuracies with respect to events during the course of the case.

mandatory disclosure by the government of any oral statements made by the Defendant to a government agent that the prosecuting attorney intends to use in evidence. The trial Court's ruling that Rule 16 applies only to statements included in reports of government agents (Tr. 8), is clearly inconsistent with both the letter of Rule 16 and the committee's notes thereunder.

(DB 16) This statement, when read together with a discussion in chambers prior to the commencement of trial (Tr. 4-8), seems to suggest that the defendant was under the illusion that he was entitled to all oral statements, not just those which could be made available for inspection, and copying or photographing, but rather anything the defendant said to a Government agent, regardless of whether the agent reduced it to some written form. Judge Coffrin denied this request and, of course, none of the cases or material cited by defendant support any such proposition since it would be virtually impossible for the Government to comply with such a request. Defendant never subsequently claimed that he had not received all of the material in report form, nor was there any claim of prejudice. Defendant does claim that he should have been provided with the statements made to Agent DuCuennois made by Zogbi concerning his understanding of importing and exporting requirements and to Agents Mercier and Kopeski concerning threats to their jobs and livelihoods. However, there is no indication that those words

were reproduced in report form and thus available to be turned over. Defendant did not raise this claim when the agents testified as to those events.

VI.

THE GOVERNMENT PRODUCED SUFFICIENT EVIDENCE TO SHOW THAT THE MUNITIONS WERE EXPORTED AND THAT ZOGBI ACTED KNOWINGLY AND WILLFULLY.

The testimony at trial established that Zogbi left the United States and went into Canada on July 27, 1977 with numerous items which were on the Munitions Control List. (Tr. 103-04, 109-112, 131 - 35) The act of leaving the geographical confines of the United States satisfied the definition of the term "export" in the applicable regulation:

For the purposes of this subchapter the term "export" means the sending or taking out of the United States in any manner any article, equipment, or technical data on the U. S. Munitions List except as may be otherwise expressly provided in a particular context.

22 C.F.R. § 121.18. Defendant contends that this definition is "excessively broad."* But this is the definition used by the District Court and taken from the same regulation wherein it is required that a shipper's export declaration be filed. 22 C.F.R. § 123.53.

* Defendant asserts further that "an exportation occurred, if at all, only in the most technical sense." (DB 19) The Government believes the evidence showed more than a "technical" exportation, but even if the evidence had shown only a technical exportation this certainly would be sufficient to support a finding of a violation of the statute.

Defendant further has failed to show why this definition is not entitled to the deference to which such regulations are entitled when promulgated by the agency responsible for the enforcement or administration of the statute.

The cases relied upon by defendant refer to situations within the context of the Customs laws where only an exportation took place but the goods never reached foreign soil as they did here. Defendant's conduct here would have satisfied the statutory requirement in United States v. Chavez, 228 U.S. 525 (1913) even though the appropriate administrative agency had not defined the term export and the language of the statute compelled a more restrictive interpretation of the term export than is required here.

It also is noteworthy that defendant, while contending in his motions for a directed verdict that no exportation had taken place, did not offer any proposed instruction on this point nor object to the instruction the Court gave based on 22 C.F.R. § 121.18. (Tr. 283-85, 337)

The evidence at the trial established that Zogbi had been informed of the need to file a shipper's export declaration for munitions at the time of his entry at Champlain, New York on July 25, 1976. (Tr. 26-28, 84) Even if Zogbi had not been specifically informed of the statutory requirements his previous experiences with

United States and Canadian Customs supported a finding by the jury in accordance with the Court's instructions (Tr. 335) that Zogbi acted in deliberate disregard of the requirements, and thus the jury could conclude "that the defendant was aware of the risk that his conduct was illegal but proceeded nonetheless." United States v. Gentile, 530 F.2d 461, 470 (2d Cir.), cert. denied, 96 S.Ct. 2651 (1976). See, e.g., United States v. Brawer, 482 F.2d 117, 128-29 (2d Cir. 1973).

Lastly, defendant never made any claim at the District Court level that he was unaware that the items he exported were on the Munitions Control List.

Any one of these conditions is sufficient to rebutt Zogbi's claim of a lack of knowledge and willfulness.

CONCLUSION

The judgment of the District Court should
be affirmed.

Respectfully submitted,

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August 15, 1977

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

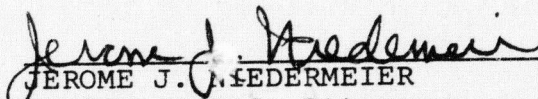
v.

Docket No. 77-1217

DANIEL BICHARA ZOGBI

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of August, 1977, mailed two copies of the attached Brief and Appendix, each, to Edward J. Tyler, III, Tyler and Bruce, 120 N. Main Street, St. Albans, Vt. 05478, postage prepaid.


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